

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

6 | SELLAM ISMAIL and MARIA ISMAIL,
pro se,

Petitioners,

VS.

UNITED STATES OF AMERICA and
ALMA QUINTERO, Revenue Agent,

Respondents.

Case No: C 10-80102-MISC SBA

ORDER DENYING PETITION TO QUASH THIRD PARTY SUMMONS

[Docket No. 1]

13 The parties are presently before the Court on Petitioners Sellam and Maria Ismail's
14 Petition to Quash Third Party Summons. (Docket 1.) Having read and considered the
15 papers filed in connection with this matter and being fully informed, the Court hereby
16 DENIES the motion for the reasons set forth below. The Court, in its discretion, finds this
17 matter suitable for resolution without oral argument. See Fed.R.Civ.P. 78(b).

18 | I. BACKGROUND

19 On April 12, 2010, Agent Alma Quintero of the Internal Revenue Service (“IRS”)
20 issued a third party summons to Wachovia Mortgage to obtain information regarding
21 Petitioners.¹ (Pet. to Quash Third Party Summons at 2, Docket 1; Quintero Decl. ¶ 1,
22 Docket 6.) Specifically, the summons seeks information to ascertain Petitioners’ potential
23 tax liabilities, to facilitate collection of any taxes owed, and/or to inquire into offenses
24 connected with the administration and enforcement of the internal revenue tax laws.
25 (Quintero Decl. ¶ 3.) The summons seeks all financial statements for which either of the
26 Petitioners’ names appeared on the account or for which either individual was an

²⁷ Wachovia Mortgage was formerly known as World Savings. (Mem. Opp. to Pet. to Quash IRS Summons at 1, Docket 5.)

1 authorized signatory on an account. (Pet. to Quash at 2.) The summons also seeks
 2 signature cards, deposit slips or items, cancelled checks, copies of payments received by the
 3 Petitioners, mortgage and loan documents, and any other financial statements related to
 4 credit worthiness submitted by either Petitioner. (Id. at 2-3.)

5 A copy of the summons was mailed to Petitioners. (Pet. to Quash at 2.) Agent
 6 Quintero incorrectly dated the Petitioners' notice "July 2, 2009," instead of "April 12,
 7 2010." (Id. at 4.); Mem. Opp. to Pet. to Quash at 4.) In response to the summons and
 8 notice, on May 3, 2010, the Petitioners filed the instant Petition to Quash Third Party
 9 Summons. The Government opposes the motion.

10 **II. LEGAL STANDARD**

11 Section 7602(a) of the Internal Revenue Code authorizes the Secretary of Treasury
 12 to issue summonses to examine and inspect the books and records of any individual in
 13 order to ascertain and collect on potential tax liabilities. 26 U.S.C. § 7602(a)(1). Section
 14 7609 sets forth specific procedures for a third-party summons, and provides that any person
 15 entitled to notice of the third-party summons has the right to bring proceedings to quash the
 16 summons. Id. § 7609(b), (h)(1) (district court has jurisdiction over a petition to quash
 17 summons if brought by an individual entitled to notice).² Since a petition to quash an IRS
 18 summons invokes the process of this Court, the Court may quash the summons if it
 19 constitutes an abuse of process. Strough v. United States, 326 F. Supp. 2d 1118, 1120
 20 (C.D. Cal. 2003).

21 To defeat a petition to quash summons, the IRS must make a *prima facie* showing
 22 pursuant to United States v. Powell, 379 U.S. 48, 57-58 (1964), which applies when the
 23 Government seeks to oppose a petition to quash summons or to enforce a summons.
 24 Crystal v. U.S., 172 F.3d 1141, 1143-44 (9th Cir. 1999). Under Powell, the Government

26 ² An IRS summons is "administratively issued but its enforcement is only by federal
 27 court authority in an adversary proceeding affording the opportunity for challenge." United
28 States v. Church of Scientology of California, 520 F.2d 818, 821 (9th Cir. 1975). The Code
 authorizes the IRS to request a federal district court to enforce a third-party summons in a
 proceeding to quash the summons. Id. § 7609(b)(2)(A).

1 must show: (1) that the investigation will be conducted pursuant to a legitimate purpose;
 2 (2) that the inquiry may be relevant to the purpose; (3) that the information sought is not
 3 already within the Commissioner's possession; and (4) that the administrative steps
 4 required by the Code have been followed. Id. "The government's burden is a slight one,
 5 and may be satisfied by a declaration from the investigating agent that the Powell
 6 requirements have been met." United States v. Dynavac, Inc., 6 F.3d 1407, 1414 (9th Cir.
 7 1993).

8 Once the Government establishes a *prima facie* case, the burden shifts to the
 9 petitioner to negate one of the four Powell elements or demonstrate a lack of good faith on
 10 the part of the Government. Id. at 1414; United States v. LaSalle Nat. Bank, 437 U.S. 298,
 11 318 (1978). "The taxpayer ... carries a heavy burden." United States v. Stuckey, 646 F.2d
 12 1369, 1372 (9th Cir. 1981). "The taxpayer must allege specific facts and evidence to
 13 support his allegations." Liberty Fin. Servs. v. United States, 778 F.2d 1390, 1393 (9th Cir.
 14 1985). "If no substantial challenge to the validity of the summons is made in a sworn
 15 affidavit or declaration alleging specific facts, the matter should be decided on the
 16 pleadings before the district court with no further proceedings." Strough v. United States,
 17 326 F. Supp. 2d 1118, 1121 (C.D. Cal. 2003) (citing Liberty Fin. Servs., 778 F.2d at 1392-
 18 93).

19 **III. DISCUSSION**

20 **A. LEGITIMATE PURPOSE**

21 The first Powell element requires the Government to demonstrate that the
 22 investigation is being conducted for a legitimate purpose. 379 U.S. at 57. According to the
 23 Government, the purpose of the summons is to "ascertain whether or not Petitioners failed
 24 to report taxable income." (Quintero Decl. ¶ 3.) This is a legitimate purpose for an IRS
 25 summons. See Nelson v. United States, 1994 WL 519485, at *6 (N.D. Cal. Sept. 19, 1994)
 26 ("Respondents issued the summons to ascertain whether petitioners' tax returns correctly
 27 reflected their income. This is a legitimate purpose.") (Smith, J.). Additionally, the
 28 Government states it has issued the summons to determine "whether there was tax liability

1 or offenses connected with the administration and enforcement of the internal revenue laws
 2 in regards to any unreported taxable income. (Mem. Opp. to Pet. to Quash at 3.) This also
 3 is sufficient to show a legitimate purpose. See Wild v. United States, 362 F.2d 206, 209
 4 (9th Cir. 1966) (“If . . . the objective of the investigation is to obtain information which
 5 may be utilized in determining whether there is civil liability for a tax . . . then the
 6 summons may be enforced”). Thus, the Court finds that the Government has articulated a
 7 legitimate purpose in seeking to determine whether the Petitioners failed to report taxable
 8 income.

9 Having met its initial burden, the burden shifts to the Petitioners to prove an
 10 improper purpose. See Dynavac, 6 F.3d at 1414. Here, Petitioners contend that Agent
 11 Quintero had “no ‘legitimate purpose’ in issuing the summons.” (Pet. Mem. to Quash at 3.)
 12 In particular, they argue that the purpose of the summons is illegitimate because mortgage
 13 records and signature cards do not, by themselves, establish a violation of IRS laws. (Id.)
 14 This argument misses the point. The salient issue is whether the Government has
 15 articulated a legitimate purpose underlying the summons. As such, whether or not the
 16 summons seeks documents that are sufficient to establish a tax liability goes to the issue of
 17 *relevance*, not whether the summons is for a *legitimate purpose*. Because the Petitioners
 18 have not otherwise provided any reasoning or authority to refute the Government’s showing
 19 that it has a legitimate purpose, the Court finds that the Petitioners have failed to show that the
 20 summons is for an improper purpose.

21 **B. RELEVANCE**

22 The second prong under Powell requires the inquiry to be *relevant* to the legitimate
 23 purpose. 379 U.S. at 57. “The IRS’ power to examine records in connection with tax
 24 investigations is broadly construed.” United States v. Zolin, 809 F.2d 1411, 1414 (9th Cir.
 25 1987), aff’d in part and vac’d in part on other grounds, 109 S.Ct. 2618 (1989). “The
 26 Government’s burden, while not great, is also not non-existent.” United States v. Goldman,
 27 637 F.2d 664, 667 (9th Cir. 1980). If the records “might throw light” on the accuracy of the
 28 returns, then they are relevant. Zolin, 809 F.2d at 1414.

1 The Government contends that the financial records sought by the summons “are
 2 relevant to and can reasonably be expected to assist in inquiry regarding the tax
 3 obligations” of the Petitioners. (Quintero Decl. ¶ 6.) In response, the Petitioners assert that
 4 the records are not relevant to the purpose of the investigation. (Pet. Mem. to Quash at 3.)
 5 They contend that “taking out a mortgage and creating signature cards or making payments
 6 towards that mortgage” does not amount to any internal revenue violation. (*Id.*) This
 7 argument is without merit. It is well settled that financial and mortgage records are relevant
 8 to determine an individual’s taxable income, and consequently, the individual’s tax
 9 liability. As such, the financial and mortgage records being sought are clearly relevant to
 10 determine whether income went unreported. See English v. Krubsack, 371 F.Supp.2d
 11 1198, 1202 (E.D. Cal. 2005) (finding that that summoned financial records related to
 12 taxpayer’s financial activity and were relevant and necessary to determine taxpayer’s
 13 income tax liabilities); Dallas v. United States I.R.S., 2006 WL 4510700, at *1 (S.D. Fla.
 14 Nov. 17, 2006) (“The information sought by the subject summons, the mortgage
 15 application and the check, was clearly relevant to determining the petitioner’s financial
 16 status and tax liabilities.”); see also Personett v. I.R.S., 2009 WL 3417863, at *6 (D. Colo.
 17 Sept. 3, 2009) (finding the relevance requirement satisfied because financial records are
 18 certain to aid in examining income tax liability).

19 The Petitioners also contend that the summons was issued in bad faith with the
 20 purpose to harass and intimidate and that the records sought could not possibly give rise to
 21 a realistic expectation of relevant information. (Pet. Mem. to Quash at 3.) However, the
 22 Petitioners’ bad faith argument is predicated on the argument that the summons seeks
 23 irrelevant information. Having found no merit to that contention, the Court also finds that
 24 the Ishmails have not shown that the Government has acted in bad faith.

25 C. **POSSESSION OF INFORMATION**

26 The third Powell requirement is that the “information sought is not already within
 27 the Commissioner’s possession.” 379 U.S. at 57-58. Agent Quintero states in her
 28 declaration that the IRS “does not otherwise have access, possession or control,” over the

1 financial records. (Quintero Decl. ¶ 2.) This statement is sufficient to satisfy the
 2 Government's burden. See Dynavac, 6 F.3d at 1414 ("The government's burden ... may be
 3 satisfied by a declaration from the investigating agent that the Powell requirements have
 4 been met.").

5 The Petitioners argue, without factual or legal support, that the "IRS already
 6 possesses all relevant information to determine whether Mr. and Mrs. Ismail may be liable
 7 under any internal revenue statute." (Pet. to Quash at 4.) They further assert that "the data
 8 summoned is incapable of adding any new information which could affect the
 9 determination of any potential liability." (Id.) However, the Petitioners are not, in fact,
 10 arguing that the IRS possesses the records; rather, they merely are claiming, as before, that
 11 the records are not relevant. Since, the Petitioners have failed to contravene Agent
 12 Quintero's statement regarding possession of the information being sought, the third Powell
 13 element is satisfied.

14 **D. COMPLIANCE WITH ADMINISTRATIVE STEPS**

15 The final Powell element requires the Government to show that it has followed the
 16 IRC's administrative steps. 379 U.S. at 58. Petitioners' only argument on this issue is that
 17 the summons is invalid because the date recorded on the notice is incorrect. (Pet. to Quash
 18 at 4.) The Government acknowledges that the notice was incorrectly dated July 2, 2009,
 19 when it should have been dated April 12, 2010. (Mem. Opp. to Pet. to Quash at 4.)
 20 However, despite this clerical error, the Government contends it does not render the
 21 summons invalid because the Petitioners "suffered no detriment." (Id. at 5.) The Court
 22 agrees.

23 Though the Ninth Circuit has not yet reached this issue, circuit courts have held that
 24 an error in the administrative process does not *per se* invalidate the summons. See United
 25 States v. Gilbert C. Swanson Found., Inc., 772 F.2d 440, 441 (8th Cir. 1985) ("[W]e believe
 26 denial of the summons would be an elevation of form over substance"); Adamowicz v.
 27 United States, 531 F.3d 151, 161 (2d Cir. 2008) ("[W]e adopt the rule that whether the
 28 government' violation of the IRC or an IRS regulation in connection with the issuance of a

1 summons affects the enforceability of that summons depends upon the totality of the
 2 circumstances, including the seriousness of the infringement, the harm or prejudice, if any,
 3 caused thereby, and the government's good faith"); Cook v. United States, 104 F.3d 886,
 4 889 (6th Cir. 1997) (employing a harmless error type analysis to conclude that a one-day-
 5 late notice did not warrant quashing the summons); Sylvestre v. United States, 978 F.2d 25,
 6 28 (1st Cir. 1992) (holding untimely notice was not a basis for quashing the summons
 7 where [the taxpayer] was not harmed by the late notice) (per curiam); United States v. Bank
 8 of Moulton, 614 F.2d 1063, 1066 (5th Cir. 1980) ("We, too, decline to elevate form over
 9 substance and reject the suggestion that every infringement of a requirement of the [IRC]
 10 absolutely precludes enforcement of an IRS summons").

11 Federal district courts within the Ninth Circuit are in accord. See Simmons v.
 12 United States, 1994 WL 16193779 (E.D. Cal. Dec. 2, 1994) (denying petitioner's motion to
 13 quash summons despite that Agent Weaver misdated the face of the summons since the
 14 summons was issued and served); Vincent v. United States, 1984 WL 3116, at *3 (E.D.
 15 Cal. Nov. 15, 1984) (denying motion to quash summons despite the technical violation of
 16 Section 2609(d)); Int'l. Bus. Enters. v. United States, 1995 WL 381626, at *3 (S.D. Cal.
 17 Mar. 30, 1995) ("[T]he sufficiency of notice should be analyzed by evaluating the good
 18 faith of the IRS agent and by analyzing whether there is injury to the taxpayer."); Fin. Sec.
 19 Corp. v. United States, 1984 WL 3127, at *2 (N.D. Cal. Dec. 6, 1984) (holding that despite
 20 the disputed technical sufficiency of the notice, petitioners were not prejudiced and thus the
 21 matter should be resolved on the merits) (Patel, J.).

22 Finally, the Petitioners have not shown any prejudice resulting from the
 23 Government's clerical error. Generally, a taxpayer may bring an action to quash a third-
 24 party summons within twenty days of receiving notice thereof. 26 U.S.C. § 7609(b)(2)(B).
 25 Based on a notice date of April 12, 2010, the twentieth day expired on Sunday, May 2,
 26 2010. Although Petitioners filed their motion on May 3, 2010, their motion is nonetheless
 27 timely. The IRC states that "[w]hen the last day prescribed under authority of the internal
 28 revenue laws for performing any act falls on Saturday, Sunday, or a legal holiday, the

1 performance of such act shall be considered timely if it is performed on the next succeeding
2 day which is not a Saturday, Sunday, or a legal holiday.” 26 U.S.C. § 7503. Since May 2,
3 2010 was a Sunday, Petitioners had until May 3, 2010 to file their motion.³ Thus, despite
4 the typographical error, the Petitioners were not prejudiced, as their petition was timely
5 filed. The Court finds that the Government has satisfied Powell’s fourth element and the
6 Petitioners have failed to carry their burden of showing that administrative procedures were
7 not followed.

8 **IV. CONCLUSION**

9 For the reasons stated above,

10 IT IS HEREBY ORDERED THAT Petitioners’ Petition to Quash Third Party
11 Summons is DENIED. This order terminates Docket 1.

12 IT IS SO ORDERED.

13 Dated: September 2, 2010


14 SAUNDRA BROWN ARMSTRONG
United States District Judge

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27 ³ The Court takes judicial notice of the 2010 calendar. See Zhou v. Wang’s
28 Restaurant, 2007 WL 134441, at 3 (N.D. Cal. January 16, 2007) (taking judicial notice of
the 2004 calendar) (Trumbull, M.J.).

1
2 UNITED STATES DISTRICT COURT
3 FOR THE
4 NORTHERN DISTRICT OF CALIFORNIA

5 SELLAM ISMAIL, ET AL. et al,

6 Plaintiff,

7 v.

8 UNITED STATES OF AMERICA, ET AL. et al,

9 Defendant.

10 Case Number: CV10-80102 SBA

11
12 **CERTIFICATE OF SERVICE**

13 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
14 Court, Northern District of California.

15 That on September 8, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said
16 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing
17 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
located in the Clerk's office.

18
19 Maria Ismail
20 1213 Jessica Drive
Livermore, CA 94550

21 Sellam Ismail
22 1213 Jessica Drive
Livermore, CA 94550

23 Dated: September 8, 2010

24 Richard W. Wiking, Clerk

25 By: LISA R CLARK, Deputy Clerk